UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOM, INC., d/b/a CHIPCO INTERNATIONAL, LTD.,	)	
Plaintiff	)	
v.	)	***Civil No. 96-156-P-DMC***
ADELL PLASTICS, INC.,	)	
Defendant	)	

MEMORANDUM DECISION ON DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE CONCERNING DAMAGES EXCEEDING THE PURCHASE PRICE OF THE RESIN

This lawsuit involves a dispute concerning certain purchases by the plaintiff from the defendant of plastic resin used by the plaintiff to manufacture gaming chips. Now before the court is the defendant's motion *in limine* seeking to exclude as irrelevant any evidence of damages beyond the purchase price of the resin. In support of the motion, the defendant relies on language in its invoices purporting to limit its damages liability to the purchase price. The defendant also relies on the court's previous decision on the defendant's summary judgment motion, in which the court determined, *inter alia*, that the term in question is a valid and enforceable part of the parties' contract. For the reasons that follow, the motion *in limine* is denied and, because a decision on the motion requires the court to revisit certain issues already decided at the summary judgment stage, I do so — determining as a matter of law that the disputed term is not part of the contract or contracts at issue in this case.

I. Background

In its motion for summary judgment, the defendant drew the court's attention to certain language in the invoice that accompanied each shipment of resin to the plaintiff. This language recited that:

> Seller makes no warranty of any kind, express or implied, and the buyer assumes all risk whatsoever as to the result of the use of materials purchased, whether used singly or in combination with other substances. No claim of any kind, whether as to materials delivered or for non-delivery of materials shall be greater in amount than the purchase price of the materials in respect of which such damages are claimed, and failure to give notice of claim within ten days from date of delivery shall constitute a waiver by the buyer of all claims in respect of such materials.

Exh. 1 to Affidavit of Arthur Dellheim (Docket No. 9) at 2. The purchase orders transmitted by the plaintiff to the defendant to begin these transactions contain no language that speaks to liability issues; indeed, the purchase orders are silent as to anything other than price, quantity, a description of the goods and time of delivery. *See* Affidavit of John M. Kendall (Docket No. 11) at ¶ 29 and Exh. 12 thereto. For purposes of the pending motion *in limine*, the court assumes that the evidence to be adduced at trial will be consistent with these aspects of the summary judgment record, and also assumes — consistent with implicit representations in the motion papers — that the plaintiff accepted the goods as tendered by the defendant without objecting to any of the terms in the invoice.

In its summary judgment motion, the defendant sought a determination that any damages would be limited to the purchase price, consistent with the invoice language quoted above.[1] In so arguing, the defendant invoked section 2-719 of the Uniform Commercial Code ("UCC"), which

[1] It is apparent from reading the defendant's summary judgment motion that its position on damages was limited to the non-tort claims. *See* Memorandum in Support of Defendant's Motion for Summary Judgment (Docket No. 7) at 9 ("Even assuming plaintiff can generate a genuine issue of material fact on each element of its claims of breach of contract and breach of express and implied warranties, plaintiff's damages must be limited to the price of the resin purchased.")

provides that parties may contractually limit the remedies available to them under the UCC, so long as the circumstances do not "cause an exclusive or limited remedy to fail of its essential purpose." 11 M.R.S.A. § 2-719(1) and (2).[2] In opposition, the plaintiff relied on section 2-207 of the UCC, the so-called "battle of the forms" provision of the Code that describes when an acceptance stating additional terms becomes part of a contract for the sale of goods.[3] Specifically, the plaintiff invoked the language in subsection 2(b) which provides that additional terms become part of the contract unless they materially alter it. The court agreed with the defendant and not the plaintiff, concluding

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[2] It has not been determined whether Maine or Maryland law applies to the contract or contracts at issue in this case. However, as the court noted in its summary judgment decision, both states have adopted the relevant portions of the UCC. For the sake of convenience, citations are to the Maine version of the statute.

[3] In its entirety, section 2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> > (a) The offer expressly limits acceptance to the terms of the offer;
> >
> > (b) They materially alter it; or
> >
> > (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Title.

11 M.R.S.A. § 2-207.

that the invoice language neither caused the contract to fail of its essential purpose nor materially altered the agreement as proposed by the plaintiff.

II. The *Ionics* Case

Four months after this court ruled on the summary judgment motion, the First Circuit made an important ruling that construed section 2-207 of the UCC. In *Ionics v. Elmwood Sensors, Inc*., 110 F.3d 184 (1st Cir. 1997), the court took up the question of whether a party may win the battle of the forms by adding limitation-of-liability language. *Ionics* answers the question in the negative, explicitly overruling prior First Circuit law. *Id*. at 189 (overruling *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962)). A careful parsing of what the First Circuit decided in *Ionics* leads inexorably to the conclusion that it is squarely applicable here.[4]

The question, purely one of law, involves a choice between subsections 1 and 3 of section 2-207. *Id.* at 187. Under *Roto-Lith*, a seller who shipped goods with a purchase order purporting to limit the seller's liability was transmitting an acceptance "'expressly * * * conditional on assent to the additional terms'" within the meaning of section 2-207(1). *Id*. at 187-88 (quoting *Roto-Lith*, 297 F.2d at 500). Therefore, by operation of section 2-207(1), the purchase order did not become an acceptance but a counteroffer, which under the common law of contracts the buyer accepted when it failed to reject the goods with knowledge of the conditions in the purchase order. *Id*.

Ionics rejects this analysis and finds subsection 3 of section 2-207 to state the operative rule.

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[4] The plaintiff advances this position only glancingly in its opposition to the motion *in limine*, having consigned full articulation of its position on the *Ionics* case to a supplemental trial brief (Docket No. 44). The defendant urges the court to disregard the plaintiff's filing as untimely and in excess of the page limit established by the court, given that the plaintiff had already filed a trial brief of 15 pages. In the circumstances I deem it appropriate to consider the supplemental trial brief.

Id. at 188. Subsection 1 is inapplicable because, "where the terms in the two forms are contradictory, each party is assumed to object to the other party's conflicting clause" and "mere acceptance of the goods by the buyer is insufficient to infer consent to the seller's terms." *Id*. at 189. Subsection 2 is inapplicable because "notification of objection to conflicting terms was given on the order form and because the new terms materially alter those in the offer." However, because "the conduct of the parties demonstrates the existence of a contract," the contract consists of those terms on which the parties' writings agreed pursuant to subsection 3. *Id*. When the smoke clears on this contractual battleground, the liability limitation sought to be added by the seller becomes a casualty to "good sense," lest "the power to re-write the contract" always go to the party who sends "the final form." *Id*. at 189-90.

In one very significant sense, the facts of the instant case are distinguishable from those in *Ionics*. The purchase order that began the transactions in *Ionics* contained specific language that asserted the availability of remedies under the law of the buyer's home state, as well as language expressly conditioning the existence of a contract "only on the exact terms" of the purchase order. *Id*. at 185. The buyer also sent the seller a letter stressing that it regarded the terms on its purchase order to be particularly important to it. *Id*. By contrast, the purchase orders of the plaintiff in this case were apparently silent on the issue of remedies and in no sense conditioned the existence of contractual assent on agreement in advance about how any liability issues might be determined.

The *Ionics* rule unambiguously encompasses either situation. Indeed, because the buyer in *Roto-Lith* had similarly not addressed liability limitation in its initial offer, the plaintiff in *Ionics* had sought to use this as a basis for distinguishing *Roto-Lith* without overruling it. *Id*. at 188. The First Circuit rejected such a distinction as "artificial" because "[e]very contract is assumed to incorporate

the existing legal norms that are in place" and it is thus "not required that every contract explicitly spell out the governing law of the jurisdiction." *Id*. In other words, for purposes of a section 2-207 battle of the forms, the initial offer is deemed to invoke all aspects of the governing law in the appropriate jurisdiction. The First Circuit could not have been more explicit in stating a rule that applies to the facts of this case in an outcome-determinative fashion.

III. Harmonizing *Ionics* with the Law of the Case

All that remains to be determined is whether, in light of *Ionics*, the court should revisit the summary judgment determination that expressly limits the plaintiff's damages to the contract price. When subsequent and controlling authority alters the principles that underlie a determination that has become the law of the case, the court has the authority to reopen issues already so determined. *Parrilla-Burgos v. Hernandez-Rivera*, 108 F.3d 445, 448 n. 6 (1st Cir. 1997). The court's summary judgment ruling and its construction of 2-207 turns on an issue not discussed in *Ionics*, i.e., whether the additional terms proposed by the seller materially altered the agreement as proposed by the buyer. The court answered the question in the negative and, thus, by operation of section 2-207(2) the additional term became part of the contract because the buyer made no objection and had not expressly limited acceptance of its offer to the terms of that offer. Although *Ionics* does not expressly turn on the material alteration provisions of section 2-207, I cannot square the court's prior ruling on material alteration with the rule laid down by the First Circuit. If the buyer's offer is deemed to include an invocation of the background law of the jurisdiction, which is one of the key insights contributed by *Ionics*, then it would certainly work a material alteration of the agreement

to add a term limiting the buyer's damages to the contract price.[5] Therefore, notwithstanding any prior ruling of the court, and assuming the evidence adduced at trial conforms to the facts assumed in this opinion, the plaintiff may assert claims for the full measure of damages available to it under the applicable law.

IV. Conclusion

For the foregoing reasons, the defendant's motion *in limine* to exclude evidence of damages in excess of the purchase price of the goods in question is **DENIED**.

Dated this 20th day of June, 1997.

David M. Cohen
United States Magistrate Judge

[5] Because, pursuant to *Ionics*, the language at issue is not part of the parties' contract or contracts, it is not necessary to address the plaintiff's position that the liability limitation language applies only to the claims arising under the UCC and not the tort claims.